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STATUTES CITED

Supreme Court of the United States

OCTOBER TERM, 1946

FIELDING B. BARLOW,

Petitioner,

vs.

FEDERAL LAND BANK OF BERKELEY

PETITION FOR WRIT OF CERTIORARI

Authority for issuing a writ of certiorari upon this petition is given by Section 240, of the Judicial Code, 28 U. S. C. A., 347.

STATEMENT OF MATTER INVOLVED

The petitioner is a farmer residing in Box Elder County, State of Utah, engaged in farming 220 acres of land. The farm was subject to two separate mortgages to the Federal Land Bank of Berkeley aggregating $20,918.03. The land was sold on May 9, 1945, subject to the Utah statutory right of redemption of six months. On July 14, 1945, the petitioner filed a petition for relief under Section 75 of the Bankruptcy Act. He, therefore, had three months and twenty-five days within which to redeem the property. Of this statement there is no controversy.

On September 10, 1945, the Federal Land Bank filed its " . . petition and motion to strike certain real property from debtor's schedules." (R. 2.)

The property described in the petition constituted the whole of debtor's farm. The petition recited the filing of a previous petition by the debtor on the 18th day of April, 1938. It refers to much controversy over the appraisal of the property and continues:

> " . . that on the 2nd day of December, 1942, this Court made and entered an order approving said reappraisal and finding that the time within which the bankrupt was allowed to redeem, which had been fixed as September 10, 1942, had expired; that no redemption whatsoever had been made or attempted, as provided by the statute; that in said order it was found that from the report of the trustee who had been appointed and from said reappraisal there was no equity or value in or to the real property which was security for the mortgages described in Paragraphs II and III hereof, and that the administration of said property would be burdensome to the estate; that it was therefore ordered that said real property 'be and the same is hereby abandoned to The Federal Land Bank of Berkeley, being the holder of mortgage liens thereon, as burdensome to said estate, and all jurisdiction of this Court in this proceeding or otherwise over said real property and the whole thereof is hereby fully relinquished and terminated;' "

and further:

> "That thereafter on or about the 15th day of August, 1944, The Federal Land Bank of Berkeley filed its complaint seeking to foreclose the mortgage hereinabove described; that the said Fielding B. Barlow contested said foreclosure action; that ultimately judgment was entered in said foreclosure action in the total sum of $20,918.03; that the foreclosure sale was held on May 9, 1945; that The Federal Land Bank of Berkeley bid the total amount of the judgments after applying certain stock which was held as collateral

security for said loans; that there are no deficiency judgments;"

Upon the sale of the property on May 9, 1944, there arose in the debtor a right of redemption, under Section 104-37-31, of Utah Code, 1943, which reads:

"The judgment debtor, or redemptioner, may redeem the property from the purchaser, within six months after the sale, on paying the purchaser the amount of his purchase in United States legal tender, with six per cent thereon in addition," etc.

As to this statement, there can be no controversy.

The bank continued its petition:

"That, by reason of the facts hereinabove stated pertaining to said bankruptcy proceeding No. 14935 (in the previous case), the said Fielding B. Barlow procured and exhausted every right he had under Section 75 of the National Bankruptcy Act to affect the real property described in Paragraphs II and III hereof by proceedings thereunder; that any and all matters which the said Fielding B. Barlow now attempts to have adjudicated and administered in said Proceeding No. 16134 are res judicata by reason of said former proceeding; that under said latter proceeding this Court acquired no jurisdiction over the property described in Paragraphs II and III hereof and no jurisdiction over the petitioner; that said real property should be stricken from the debtor's schedules in Proceeding No. 16134;"—(R. 5.)

Upon hearing, the district court granted and allowed the motion and petition, and further ordered that (R. 9)

" . . the said real property hereinafter described is hereby stricken from the schedules of said debtor on file herein;

> provided, however, that if said debtor shall redeem said real property at said sheriff's sale within the period of redemption of six months from and after May 9, 1945, the date of said sale, as provided by the laws of the State of Utah, said real property shall, upon such redemption, be restored to the schedules of said debtor herein."

An appeal was taken from the order striking the real estate from the schedules to the Circuit Court of Appeals for the Tenth Circuit, and on July 3, 1946, it rendered an opinion and entered judgment affirming the judgment of the district court stating: (R. 15.)

> "But, the Bankruptcy Act does not recognize the right or equity of redemption as an interest separate and apart from the property to which it belongs, nor does it provide that such interest shall be the subject matter of adjudication after all the benefits afforded by the Act have been fully exhausted in respect to the property from which only the right of redemption remains."

It is contended that the order of the district court and the opinion and the judgments of the Circuit Court of Appeals are contrary to and in direct conflict with Section 75 (n) of the Bankruptcy Act, which reads:

> "The filing of a petition or answer with the clerk of court, or leaving it with the conciliation commissioner for the purpose of forwarding same to the clerk of court, praying for relief under this section, shall immediately subject the farmer and all his property, wherever located, for all the purposes of this section, to the exclusive jurisdiction of the court, including all real or personal property, or any equity or right in any such property, including among others, contracts for purchase, contracts for deed, or conditional sales

contracts, the right or the equity of redemption where the period of redemption has not or had not expired."

And further that the orders and judgments are contrary to the law as laid down by this court in:

Wragg v. Federal Land Bank of New Orleans, 317 U. S. 325, 87 L. Ed. 300;

Wright v. Logan, 315 U. S. 139, 86 L. Ed. 745;

John Hancock Mutual Life Insurance Co., v. Bartels, 308 U. S. 180, 84 L. Ed. 176;

Kalb v. Feuerstein, 308 U. S. 433, 84 L. Ed. 370;

Borchard v. California Bank, 310 U. S. 311, 84 L. Ed. 1222.

By the opinion and judgment of the district court affirmed on appeal which we seek to review in this proceeding, the court has held that the right or equity of redemption which admittedly had not expired when the petition was filed did not come under the provisions of Section 75 (n) in the face of the express provisions of the statute and that it was not such a right as was subject to administration in the face of the decisions of this Court in Wragg v. the Federal Land Bank of New Orleans, supra, wherein this court said:

"Section 75 (n) of the Bankruptcy Act confers jurisdiction over the debtor's 'right or the equity of redemption where the period of redemption has not or had not expired.' Wright v. Logan, 315 U. S. 139, 142, 86 L. ed. 745, 749, 62 S. Ct 508, 48 Am Bankr Rep (NS) 81, and see State Bank v. Brown,—US—, Ante, 119, 120-122, 63 S Ct 128, decided November 16, 1942. Looking at the scope and purpose of Section 75, we think petitioner's interest in the mortgaged property, whether it be denominated a property right or a privilege of redemption, is an interest intended to be subject to the court's jurisdicition and is capable of administration in

> a farmer-debtor proceeding. See Mangus v. Miller, 317 US—, ante, 135, 63 S Ct 182."

and Wright v. Logan, supra, wherein this Court said:

> "It is nevertheless appropriate to point out at this time that whatever right of redemption the petitioners had when they first applied for adjudication under 75 continued to be a part of their assets, subject to administration by the bankruptcy court. For 75 (n) subjects all of the farmer debtor's assets, specifically including rights of redemption, to the jurisdiction of the bankruptcy court, and provides that 'the period of redemption shall be extended . . . for the period necessary for the purpose of carrying out the provisions of this section.' 11 U S C A (Supp II) Sec. 203, (amendment of August 28, 1935, 49 Stat. at L. 942, chap. 792, 11 USCA Sec. 203). See Wright v. Union Cent. L. Ins. Co. 304 US 502, 513-516, 82 L. ed. 1490, 1499-1501, 58 S Ct 1025, 36 Am Bankr Rep (NS) 950."

It is also in conflict with the opinion of the Circuit Court of Appeals of the Tenth Circuit, in

Layton v. Thayne, 133 Fed. 2nd 287, wherein the Court said:

> "This right of redemption is within the protective provisions of the Act and my be protected in a proceeding instituted by one entitled to the benefits of the Act."

The specific question presented by this petition is: Does a prior abortive proceeding which has not been carried through as directed by the statute construed in

> John Hancock Mutual Life Insurance Company v. Bartels, supra,

bar the maintenance of a new proceeding? The opinion of the Circuit Court of Appeals, at this writing, has not been published, but it will be found on page 15 of the printed record.

WHEREFORE, petitioner prays that a writ of certiorari issue directing that the proceedings of the Circuit Court of Appeals for the Tenth Circuit be certified; that the judgment of the Cricuit Court of Appeals and the District Court of the United States for the District of Utah be reversed, and that petitioner be granted all of the rights given by Section 75 of the Bankruptcy Act.

J. D. SKEEN,
Attorney for Petitioner.

SUPPORTING BRIEF

It was thought that this Court had finally settled all questions pertaining to the administration of a right or equity of redemption under Section 75 of the Bankruptcy Act in

> Wragg v. The Federal Land Bank of New Orleans, 317 U. S. 325, 87 L. Ed. 300,

where it was precisely held that a right of redemption is an interest subject to the jurisdiction of the Bankruptcy Court and is capable of administration in a farmer debtor proceeding, and by

> Wright v. Logan, 315 U. S. 139, 86 L. Ed. 745,

wherein the court said:

> "It is nevertheless appropriate to point out at this time that whatever right of redemption the petitioners had when

> they first applied for adjudication under 75 continued to be a part of their assets, subject to administration by the bankruptcy court. For 75 (n) subjects all of the farmer debtor's assets, specifically including rights of redemption, to the jurisdiction of the bankruptcy court, and provides that 'the period of redemption shall be extended . . . for the period necessary for the purpose of carrying out the provisions of this section.' 11 USCA (Supp II) Sec. 203 (amendment of August 28, 1935, 49 Stat. at L. 942, chap. 792, 11 USCA Sec. 203). See Wright v. Union Cent. L. Ins. Co. 304 US 502, 513-516, 82 L ed 1490, 1499-1501, 58 S Ct 1025, 36 Am Bankr Rep (NS) 950."

Apparently, the Circuit Court of Appeals of the Tenth Circuit at the time of the decision of the case of

Layton v. Thayne, July 19, 1943, 133 Fed. 2nd 287 thought the question settled for it said:

> "This right of redemption is within the protective provisions of the act and may be protected in a proceeding instituted by one entitled to the benefits of the Act."

In that case, the debtor had been removed from his premises, the right of redemption which arose from the sale of the property on foreclosure of a second mortgage had expired, and the court was dealing only with a right of redemption which arose under the foreclosure of the first mortgage at a subsequent date.

The debtor had been in a former proceeding under Section 75.

The court said:

> "Appellant began his first proceeding under Section 75 June 22, 1933. For more than 9 years in one form or another

this proceeding has wended its tortious way through the courts and should be concluded without further unnecessary delay."

The Circuit Court of Appeals in the instant case said:

"But, the full measure of relief afforded by the Act does not entitle a farmer-debtor *to twice adjudicate the same obligations* on the same property. That is exactly what appellant seeks to do in this case. His right of redemption, which he seeks to adjudicate is but the residuum of that over which he has *already been afforded the full measure of relief contemplated by the Act,* and the law in all of its beneficience does not twice grant relief on the same subject matter."

Just what is meant by the italicized statement is not made clear. No obligation has been adjudicated. The law contemplates no adjudication of an obligation. If, by that is meant the determination of the existence of a debt, it is meaningless for the debt was admitted. It was the proceeding which proved abortive, becaus ethere were irregularities in the appraisement and because the court abandoned the property instead of carrying out the terms of the statute which this court specifically directed the courts to do in

John Hancock Mutual Life Insurance Company v. Bartels, 308 U. S. 180, 84 L. Ed. 176.

Had the bank not prevailed upon the corut to abandon the property in the midst of administration, the proceeding could have been closed in harmony with the statute. The court, having granted the motion to abandon the property, the jurisdiction was terminated. There had been no "full measure of relief," as contemplated by the statute.

This Court said in the Wragg case:

"But the dismissal of the original proceeding and denial of the application to reopen it were not bars to a new proceeding under Section 75 to secure whatever relief the Act would afford with respect to petiitoner's remaining interest in the mortgaged property. We find no intimation in the language and purposes of the Act that an unsuccessful earlier proceeding would preclude a new petition so long as the farmer retains an interest which could be administered in a proceeding under Section 75."

There is no differentiation between this case and the Wragg and Logan cases.

The court had before it both of the cases and hence, there was no oversight.

The court further said:

"But the Bankruptcy Act does not recognize the right or equity of redemption as an interest separate end apart from the property to which it belongs, nor does it provide that such interest shall be the subject matter of adjudication after all the benefits afforded by the Act have been fully exhausted in respect to the property from which only the right of redemption remains."

This is but saying that a right of redemption is not subject to administration under Section 75. But the statute and this court has said that it is, and as said in the Logan case ,it contineus to be a part of the assets subject to administration by the bankruptcy court. There is nothing left for a play upon words. If it is a property right, and admittedly it is,

"It is for the Bankruptcy Court to determine by reference to the provisions of the bankruptcy statute what rights

> created by the state law regardless of the characterization which may be applied to them by state statutes and decisions are within the jurisdiction of the bankruptcy court."

and the jurisdiction is there given to administer those rights.

In construing the Utah statutes, the Circuit Court in Layton v. Thayne, supra, characterized this statutory right as a "right of redemption." This right of redemption did not come into existence until the property was sold on foreclosure of the mortgage long after the order of the District Court abandoning the property. The property was abandoned December 2, 1942, the right came into existence on May 9, 1944, the date of the sale, and yet, we are told that the order of December 2, 1942, if that is what is meant by an adjudication, is res judicata of the right to redeem which came into existence May 9, 1944. There is no difficulty in understanding this right which arose under the Utah Statute and there is no differentiation between this right and any other right of redemption. It was a right to pay and take the property. That being the case, it came within the express provisions of the statute and the decision of this Court. Any attempt to distinguish between this right of redemption and any other right of redemption is futile because there is no distinction. This Court, in

> New Orleans v. Citizens' Bank of Louisiana, 167 U. S. 371, 42 L ed. at page 211,

said:

> "In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of aciton to the matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action,

not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

This right, not having been in existence when the order of abandonment was made, it could not have been litigated. At that time the court said there was no equity in the property and that may have been true on December 2, 1942. However, through the abondonment of the property, the debtor was left with a potential right of redemption which actually came into existence on May 9, 1944. The court did not and could not have said there would be no equity in the property on May 9, 1944, because, in all its wisdom, the court could not know. The debtor still had a right to have it judicially determined whether when the right of redemption arose, there was an equity that could be saved and that was what he sought by the new proceeding. Furthermore, by the decision of this court in the Bartels case, the relationship between the amount of the debt and the value of the property was immaterial. Even though the value of the property was much less than the debt, still the debtor had a right to try to work out a settlement and if need be, through a regular appraisement, to redeem for a sum less than the amount of the indebtedness. Certainly that it settled law.

It is submitted htat the debtor has been deprived of a substatial right through the striking of the property and the writ should issue.

Respectfully submitted,

J. D. SKEEN,

Attorney for Petitioner.